

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GUS BENTLEY,

Defendant-Appellant.

UNPUBLISHED

January 20, 2005

No. 251260

Wayne Circuit Court

LC No. 03-004324-01

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL SHWAN STINSON,

Defendant-Appellant.

No. 251311

Wayne Circuit Court

LC No. 03-003535-01

Before: Schuette, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendants appeal as of right their jury trial convictions for second-degree home invasion, MCL 750.110a(3). Defendant Stinson was sentenced to 57 to 180 months in prison. Defendant Bentley was sentenced to 19 to 180 months in prison. We affirm.

This case arose when an electrician arrived at a duplex on a morning in late January 2003. The victim, Bryant Jones, owned the duplex. His father, while absent that morning, was in the process of moving out of the downstairs apartment. The electrician went to an alley behind the residence and found defendant Bentley sitting in a pickup truck. The electrician noticed that a window was broken and the duplex's back door was open. As the electrician pulled farther into the alley, Bentley drove the truck past him, nodded to him, and drove away. The electrician saw the truck's license plate and wrote it down. While in the alley, the electrician saw defendant Stinson through one of the back windows of the duplex. Uttering expletives, Stinson ducked out of sight. The electrician called Jones, who was already on his way to the duplex. Stinson composed himself and nonchalantly walked out the open back door toward the electrician. The electrician asked Stinson what was going on, and Stinson lied that he

was also there to do work. To complete the illusion, he spouted nonsense about repairing some antiques for a nonexistent man named Archie and opined that the fireplace was still in good condition. The electrician tried to stall Stinson until Jones could arrive, but Bentley pulled back into the far end of the alley and Stinson stepped briskly over to the truck, jumped in, and rode away. When Jones arrived, he noticed that several boxes his father had packed were out of place and then discovered that some of his father's belongings were missing.

Defendants contend that the trial court erred when it refused to give a requested instruction on the lesser included offense of entering a building without breaking, MCL 750.111. We disagree. We review de novo claims of instructional error. *People v Apgar*, ___ Mich App ___, ___ NW2d ___ (Docket No. 247544, issued November 4, 2004), slip op, p 2.

Assuming arguendo, that entering without breaking is a necessarily lesser included offense of second-degree home invasion, the trial court correctly denied defendants' request because the proposed jury instruction was not supported by a rational view of the evidence. *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). While defendants assert that a jury could rationally conclude that they did not break the duplex's window or throw open its door, this argument ignores the fact that breaking is not a necessary element of second-degree home invasion. Rather, a jury may return a guilty verdict for second-degree home invasion if the accused merely lacks permission to enter the victim's dwelling. MCL 750.110a(3). Because no rational view of the evidence, or even the irrational view proposed by defendants, supports a claim that Stinson had permission to enter the duplex, the trial court did not err when it denied defendants' request for a jury instruction on entering without breaking. *Cornell*, *supra*.

Defendants also challenge the sufficiency of the evidence against them, and the trial court's denial of Stinson's motion for directed verdict. We disagree. In reviewing the sufficiency of evidence to support a conviction, we view the evidence de novo in a light most favorable to the prosecution and determine whether a rational factfinder could conclude that the prosecution proved the essential elements of the crime beyond a reasonable doubt. *People v Fennel*, 260 Mich App 261, 270; 677 NW2d 66 (2004). Circumstantial evidence and reasonable inferences drawn from it are sufficient to establish the elements of a crime. *Id.* In this case, we can see how Stinson's trespassory presence in the duplex (along with the broken window, open door, moved boxes, missing items, and waiting pickup truck) could lead a reasonable jury to infer that Stinson broke into the house with a larcenous intent. *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001). Furthermore, Bentley's presence in the alley behind the wheel of the truck and his later reappearance to spirit Stinson away more than suggest his complicit role in the crime as Stinson's lookout and getaway driver. *People v Moore*, 470 Mich 56, 63; 679 NW2d 41 (2004). Therefore, the prosecutor sufficiently proved the elements of the crimes, and we reject defendants' spurious arguments to the contrary.

Stinson next challenges the admission of an officer's testimony that the description the electrician gave of the individual in the house matched the perpetrator of other break-ins in the area. Stinson argues that the introduction of this other-acts evidence without prior notice was plain error requiring reversal under MRE 404(b) and MRE 103(a)(1). We disagree. Because Stinson failed to preserve this issue, he must demonstrate plain error affecting his substantial rights before we will reverse on this basis. MRE 103(a)(1). While close review of the evidence reveals that it does implicate Stinson in other burglaries, the implication is not "plain," but peripheral. One must first assume that the electrician accurately described the intruder (an

assumption Stinson would prefer that we avoid), then adopt the connection the officer drew between the accurate description and other descriptions, and finally assume that those descriptions were also accurate. Defendant would then have us require the trial court instantly and automatically to reach the conclusion that the prosecutor's introduction of the evidence is an attempt to convict defendant based on the fact that he (or another, or even others, who match his description) tend to loot unoccupied homes, rather than merely to explain how the officers continued their investigation and why they reasonably included Stinson among their possible suspects. This falls well short of the "plain error" standard. Moreover, the prosecutor left this evidence vague and never argued it to the jury. Therefore, in light of the strong evidence against Stinson, we do not find that the introduction of this evidence had any affect on the verdict.

Stinson next argues that the trial court erred when it failed to instruct the jury regarding Stinson's belief that the property was abandoned. We disagree. Stinson failed to request an instruction on abandoned property and did not raise this issue as an objection to the instructions given. Accordingly, this issue is forfeited, and Stinson must demonstrate plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 761-764; 597 NW2d 130 (1999).

Here, there was insufficient evidence of Stinson's alleged belief that the property was abandoned to warrant an instruction. Testimony by Jones established that the home was not abandoned and the boxes were prepared for moving them. Therefore, the evidence did not support an instruction on abandonment, and the trial court did not commit plain error when it failed to sua sponte instruct on the legal effect of abandoned property.

Stinson's last issue on appeal is that the trial court erred when it denied his motion to suppress the lineup identification because Stinson was the only individual moved during the lineup to give the witness a better view. We disagree. "The trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous." *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004). The test is whether, in light of the circumstances, the procedure was so suggestive that it led to a substantial likelihood of misidentification. *Id.* Here, the lineup process did not increase the chances of misidentification. The electrician requested that officers move Stinson so he could be absolutely sure of his identification. The electrician had ample opportunity to observe the person who came out of the duplex, and they conversed for over a minute in broad daylight. The electrician testified that after picking Stinson in the lineup, he had "[n]o doubt at all" that Stinson was the same person as the offender. Under the circumstances, the trial court properly concluded that the identification testimony was admissible.

Affirmed.

/s/ Bill Schuette
/s/ David H. Sawyer
/s/ Peter D. O'Connell